

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 18, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Frontline Millionaires LLC*  
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Serial No. 88679886  
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Dale R. Jensen of Dale Jensen, PLC,  
for Frontline Millionaires LLC.

Jami E. Holland, Trademark Examining Attorney, Law Office 122,  
Kristin Dahling, Managing Attorney.

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Before Wolfson, Adlin and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Frontline Millionaires LLC (“Applicant”) seeks registration on the Principal  
Register of the standard character mark RISK & REWARD for:

Clothing, namely, shirts, long-sleeved shirts, T-shirts, under shirts, night shirts, rugby shirts, polo shirts, jerseys, cardigans, bottoms, pants, shorts, boxer shorts, tops, crop tops, tank tops, tankinis, sweat shirts, hooded sweat shirts, sweat jackets, sweat shorts, sweat pants, sweaters, vests, pullovers, jackets, track jackets, sports jackets, turtlenecks, swimwear, beachwear, caps being headwear, hats, visors being headwear, headbands, wrist bands, sweat bands, headwear, ear muffs, aprons, scarves, belts, bandanas, neckwear, neck bands, underwear, briefs, singlets, socks, loungewear, robes, underclothes, pajamas,

sleepwear, leg warmers, hosiery, gloves, rainwear, footwear, flip-flops, and slippers in International Class 25.<sup>1</sup>

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the Application, so resembles the following registered marks:

<b>Mark</b>	<b>Registration No. Owner and Issue Date</b>	<b>Goods</b>
RIZKY REWARDZ (standard chars.)	5603574 (Supplemental Register) Jermaine Parker Wells Issued Nov. 6, 2018	Baseball caps and hats; Graphic T-shirts; Hooded sweat shirts; Short-sleeved or long-sleeved t-shirts; Sweat shirts; Toboggan hats, Cl. 25
 RIZKY REWARDZ <sup>2</sup>	5832411 (Principal Register) Jermaine Parker Wells Issued August 13, 2019	Baseball caps and hats; Graphic T-shirts; Hooded sweatshirts for men, women, children; Short-sleeved or long-sleeved t-shirts; Sweat shirts; Toboggan hats; Toboggan hats, pants and caps; Hooded sweat shirts, Cl. 25
RISK.REWARD (standard chars.)	4722762 (Principal Register) 33.Black, LLC Issued April 21, 2015 Sections 8 and 15 Affidavits filed	Clothing, namely, headwear, t-shirts, polos, shorts, sweat pants, sweat shirts, swim wear, jackets, belts, jeans, slacks, woven shirts, knit shirts, tank tops, socks, sweaters, hats, beanies, caps, athletic shirts, athletic shorts, athletic tank tops, athletic pants, golf polos, golf shirts, golf pants, golf shorts, golf skirts, slacks, gloves and footwear, Cl. 25

as to be likely to cause confusion, mistake or deception among relevant purchasers.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for

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<sup>1</sup> Application Serial No. 88679886 was filed on November 4, 2019, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> Registration No. 5832411 contains the following description of the mark: "Color is not claimed as a feature of the mark. The mark consists of a design representing a stylized letter 'R' comprised of a series of 3 horizontal bands, one angled band and one triangular shape, all above the stylized wording 'RIZKY REWARDZ'."

reconsideration, the appeal was resumed. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

### **I. Focus on Two of the Cited Marks**

Registration No. 5603574 for the RIZKY REWARDZ mark (in standard characters) and Registration No. 5832411 for the RIZKY REWARDZ and Design mark are owned by the same person. We focus our likelihood of confusion analysis on Registration No. 5603574 for the RIZKY REWARDZ standard character mark and Registration No. 4722762 for the RISK.REWARD standard character mark because those marks include fewer points of difference than does the cited composite mark RIZKY REWARDZ and Design of Registration No. 5832411. If we find that there is no likelihood of confusion with the registered RIZKY REWARDZ or RISK.REWARD marks of Registration Nos. 5603574 and 4722762, there is no need for us to consider the likelihood of confusion with the RIZKY REWARDZ and Design mark of Registration No. 5832411. *See, e.g., N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1225 (TTAB 2015) (citing *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010)).

### **II. Likelihood of Confusion - Applicable Law**

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each

*DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

Varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”)) (citations omitted).

### III. Likelihood of Confusion - Analysis

We now consider the arguments of Applicant and the Examining Attorney, and the evidence of record, in light of the applicable law regarding likelihood of confusion.

#### A. The Similarity or Dissimilarity of the Goods, Channels of Trade and Classes of Purchasers

##### 1. Goods

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods ... as described in an application or registration...” *DuPont*, 177 USPQ at 567. When we consider the relatedness of the goods, our analysis is premised on a comparison of the goods as they are set out in the application and the cited registrations. *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”). *See also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (quoting *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) (“[L]ikelihood of confusion must be determined based on an analysis of the mark applied to the goods ... recited in applicant’s application vis-à-vis the goods ... recited in [a] ... registration, rather than what the evidence shows the goods ... to be”). It further is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983).

Here, the clothing items identified in the RISK & REWARD Application are identical to many of the same goods recited in the RIZKY REWARDZ and RISK.REWARD registrations. For example, “long-sleeved shirts, t-shirts, sweat shirts and hooded sweat shirts” are identified in both the RISK & REWARD Application and RIZKY REWARDZ Registration; and “pants, shorts, tank tops, sweat shirts, sweaters, jackets, hats, belts, socks and footwear” are identified in both the RISK & REWARD Application and RISK.REWARD Registration. Thus, the second *DuPont* factor, pertaining to the respective the goods, strongly supports a finding the confusion is likely.

## 2. Trade Channels

The third *DuPont* factor considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014). Because Applicant’s goods are identical-in-part to the goods in each of the cited registrations we are focusing on, we must therefore presume that the channels of trade and potential consumers are also identical-in-part. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018).

Additionally, the Examining Attorney made of record pages from the websites of Banana Republic, H&M, Levi's, Nike, Off-White and Benetton showing that Applicant's types of goods and Registrants' types of goods are advertised for sale on the same websites under the same marks.<sup>3</sup> Thus, apart from the identity of the goods identified in the Application and cited Registrations, the Examining Attorney's proofs made of record demonstrate that the identified goods are related in the marketplace – advertised and sold at the same direct-to-consumer websites.

The second *DuPont* factor, relatedness of trade channels and customers, also strongly supports a finding that confusion is likely.

## **B. The Marks at Issue**

In our evaluation of the similarity or dissimilarity of Applicant's and Registrants' marks under the first *DuPont* factor, *DuPont*, 177 USPQ at 567, we first consider the strength of Registrants' marks and then compare these marks to Applicant's mark in their entireties.

### **1. Strength of the Cited Marks**

Turning to the strength of Registrants' marks, which affects the scope of protection to which they are entitled, we consider the inherent or conceptual strength of Registrants' RIZKY REWARDZ and RISK.REWARD marks, based on the nature of the marks themselves, and we consider their commercial strength, based on marketplace recognition of the marks. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both

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<sup>3</sup> Office Action of July 27, 2020, at TSDR 9-122.

by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”). The commercial strength of Registrants’ marks also is affected by the number and nature of third-party use of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

As the RISK.REWARD mark is registered on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), it is presumed to be inherently distinctive for the recited clothing items. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). The RIZKY REWARDZ mark, on the other hand, is registered on the Supplemental Register, and thus not entitled to a presumption of inherent distinctiveness under Trademark Act Section 7(b), 15 U.S.C. § 1057(b). However, “in at least the *ex parte* context, the provisions of Section 2(d) of the [Trademark] Act apply to registrations on the Supplemental Register, and therefore, ‘a mark registered on the Supplemental Register can be used as a basis for refusing registration to another mark under 2(d) of the Act.’” *Otter Prods. LLC v. BaseOneLabs LLC*, 105 USPQ2d 1252, 1254 (TTAB 2012) (quoting *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 340 (CCPA 1978)). “In the *ex parte* context, the [USPTO] does not and cannot question the validity of a mark in a registration cited against another under [Trademark Act] Section 2(d).” *Id.* at 1256.

Applicant argues:<sup>4</sup>

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<sup>4</sup> Applicant’s Brief, 7 TTABVUE 15, 18.

[M]any similar marks ... [to RIZKY REWARDZ and RISK.REWARD], all of which include the word RISK, have been in **use** in the same commerce class for many years without any apparent confusion showing that consumers buying clothing distinguish between providers by slight differences in trademarks. [Thus,] ... the evidence proves that in the commerce area of clothing consumers have been educated to distinguish between different marks based upon minute distinctions. (Emphasis added).

To support this argument, Applicant made of record 23 third-party use-based **registrations** of marks including the term RISK or RISKY (some with alternative spellings or additional punctuation), all of which are for clothing products.<sup>5</sup> Applicant, however, conflates its argument concerning third-party **use** with that of third-party **registrations** for which no evidence of use has been shown.

“Third-party registration evidence ... may bear on conceptual weakness if a term is commonly registered for similar goods ....” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017). That is, third-party registrations may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). Thus, the third-party registrations Applicant made of record are probative as to conceptual weakness.

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<sup>5</sup> Petition to Revive and Request for Reconsideration of February 13, 2021, at TSDR 10-39, 42-55, 58-59.

The third-party registrations that Applicant made of record are the following:<sup>6</sup>

Trademark	Registration No.	Registration Date
#BIGRISKBIGCHECK	6020054	March 24, 2020
B.O.Y.B.E.A.T.E.R.Z RULE BELIEVE ONLY YOURSELF BELIEVE EVERYTHING'S ATTAINABLE TRY EVERYTHING RISK ZERO	3013014	November 8, 2005
FLYTE RYSK WEAR WHAT YOU WANT	6218801	December 8, 2020
	4806486	September 8, 2015
LIBERTY RISK	4893563	January 26, 2016
NO RISK IT, NO BISCUIT	5287042	September 12, 2017
NO RISK NO STORY	4926715	March 29, 2016
PLAY AT YOUR OWN RISK	3739791	January 19, 2010
	4569524 (cancelled)	July 15, 2014
RIDE FREE. TAKE RISKS.	3657663	July 21, 2009
RIS-K	5301153	October 3, 2017
RISK-ALERT	3557027	January 6, 2009
 (RISK ANDRÉ SARDÁ)	2159791 (cancelled)	May 26, 1998
RISK IT ALL	5144897	February 21, 2017
RISK MORE, HIDE LESS	4973585	June 7, 2016
RISK X HUSTLE	5354992	December 12, 2017
RISK&RICHES	5994063	February 25, 2020
RISKBENEFIT	4813250	September 15, 2015
TAKEN RI\$K	5386208	January 23, 2018
TOUCH AT YOUR OWN RISK	5783180	June 18, 2019
 (T.R.A.P TAKE RISK AND PROSPER)	4860726	November 24, 2015
	5259079	August 8, 2017

<sup>6</sup> We do not afford any probative value to cited third-party Registration Nos. 4569524 or 2159791, which have been cancelled. A cancelled registration is not evidence of any existing rights in the mark. *See Action Temp. Servs. v. Labor Force*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989). An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).

<b>Trademark</b>	<b>Registration No.</b>	<b>Registration Date</b>
RISKY	5259113	August 8, 2017

In view of Applicant's submitted third-party registration evidence, we find that the term RISK may be considered somewhat conceptually weak as a trademark element in connection with clothing products. However, the cited marks are RIZKY REWARDZ and RISK.REWARD. None of the third-party registered marks Applicant made of record contain both the term RISK (or a term visually/aurally similar) **and** the term REWARD (or a term visually/aurally similar). Also, the vast majority of the third-party registered marks Applicant cites have additional terms or designs in addition to the term RISK or RISKY (or a term visually/aurally similar), making many of them less similar to Applicant's mark than Registrants' marks are, thus causing us to discount their probative value. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*25 (TTAB 2021).

Turning to commercial strength, while Applicant submitted examples of third-party **registrations**, it did not submit any current market evidence demonstrating third parties **using** similar marks on similar goods. *Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*9 (TTAB 2020). “[L]ittle weight is to be given such [third-party] registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them ....” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) (quoted in *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd*, 777 F. App'x 516 (Fed. Cir. 2019)). “Applicant's citation of third-party registrations ... standing alone ... [is] not

evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.” *In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (also citing *AMF v. Am. Leisure Prods.*, 177 USPQ 268)).

Not only did Applicant fail to make of record any evidence as to third-party uses of purportedly similar marks to RIZKY REWARDZ or RISK.REWARD. In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited marks in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016).

We therefore afford Registrants’ RISK.REWARD and RIZKY REWARDZ marks the scope of protection to which these registered marks are entitled. The RISK.REWARD mark is inherently distinctive; and the Examining Attorney correctly cited the RIZKY REWARDZ mark as a basis for refusal, even though the mark is registered on the Supplemental Register.

## **2. The Similarity or Dissimilarity of the Marks**

We determine the similarity or dissimilarity of Applicant’s and Registrants’ marks in their entireties under the first *DuPont* factor, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d at 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). Moreover, where, as

here, the respective goods are in-part identical “the degree of similarity necessary to support a conclusion of likely confusion declines.” *In re Dixie Rests.*, 41 USPQ2d at 1534 (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1700 (Fed.Cir.1992)).

The respective marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must instead rely upon their recollections, which may be imperfect. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). “The proper test[, therefore,] is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted). Moreover, the focus is on the recollection of the average purchaser, here, an ordinary consumer of clothing items, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the finding must be based on the entire marks,

not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Further, “[n]o element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

Applicant, in its brief, notes several hyper-technical and insignificant differences in appearance, sound, meaning and/or commercial impression between its mark and the registered marks cited by the Examining Attorney,<sup>7</sup> for example: 1) RISK vs. RIZKY, 2) REWARD vs. REWARDZ, 3) singular vs. plural, 4) use of the “&” symbol (ampersand) vs. a “.” (a dot or period) or no punctuation, 5) the “&” portion of RISK & REWARD is not present in RIZKY REWARDZ or RISK.REWARD, which connotes or has a commercial impression of a specific set of benefits associated with taking a risk, while the absence of that symbol in the cited marks connotes that any reward

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<sup>7</sup> Applicant’s Brief, 7 TTABVUE 11-14.

associated with either mark is dangerous, 6) the presence of the letter “Z” in RIZKY REWARDZ has a distinct urban connotation, carrying with it a connotation of something that is considered in an ultra-positive manner in urban cultures,<sup>8</sup> and 7) use of the “.” (dot or period) in RISK.REWARD is commonly associated with an Internet address, which is not present in RISK & REWARD.

We begin with the observation that Applicant’s semantic attempts to distinguish RISK & REWARD from each of the cited RIZKY REWARDZ and RISK.REWARD marks violate the anti-dissection rule of *In re Nat’l Data* and *Franklin Mint* discussed above. We now address Applicant’s professed dissimilarities between its mark and each of the cited marks.

**Appearance and Sound:** Alternative spellings, here a substitution of the letter “Z” for the letter “S” in the cited RIZKY REWARDZ mark, does not obviate a finding of similarity where the marks may be pronounced similarly. *See In re Viterra Inc.*,

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<sup>8</sup> In support of this argument, Applicant cites in its Brief, 7 TTABVUE 13, to the URBAN DICTIONARY (<https://www.urbandictionary.com/define.php?term=z>), which defines “Z” to mean “the most badass letter of the alphabet. No exceptions.” Although this URL was cited, the captured URBAN DICTIONARY web page containing this definition was not made of record during prosecution. *In re ADCO Industries – Technologies, L.P.*, 2020 USPQ2d 53786, at \*2 (TTAB 2020) (web addresses or hyperlinks are insufficient to make the underlying webpages of record); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 n.21 (TTAB 2018) (Board does not consider websites for which only links are provided). Thus, we do not consider it. *See In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) (“Statements in a brief cannot take the place of evidence.”). Even were we to consider this “definition,” it would come with limitations. URBAN DICTIONARY is a collaborative slang dictionary with definitions or edits submitted by visitors to the website. This potential reliability problem could have been resolved so long as the Examining Attorney had an opportunity to rebut Applicant’s evidence by submitting other definitions possibly calling into question its accuracy. Applicant could have made this URBAN DICTIONARY definition of record early enough to allow the Examining Attorney an opportunity to rebut this evidence if she believed the definition was incorrect. *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013). Applicant, however, did not afford the Examining Attorney with such an opportunity.

101 USPQ2d 1905, 1912 (affirming the Board’s refusal to register the mark XCEED over the registered mark X-SEED, both for agricultural seed; “any minor differences in the sound of these marks may go undetected by consumers and, therefore, would not be sufficient to distinguish the marks.”); *see also, Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1409 (TTAB 2010) (finding the marks VIGILANCE and VIGILANZ similar (although dismissing the opposition on other grounds) “there is no single correct pronunciation of a trademark that is not a common English word because it is impossible to predict how the public will pronounce a particular mark.”). We find that the substitution of the letter “Z” for the letter “S” in the cited RIZKY REWARDZ mark does not sufficiently change its appearance or pronunciation to obviate a finding of similarity.

The first term in Applicant’s mark (RISK & REWARD) is missing the terminal letter “Y” in the first term of the registered mark (RIZKY REWARDZ). The absence of the terminal letter “Y” in Applicant’s mark is insufficient to avoid the similarity. *See In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977) (“The mark of the applicant, ‘KIKS’ and the cited mark ‘KIKI’ differ only in the terminal letter of each mark. While differing in sound, the marks are similar in appearance and have a somewhat similar connotation,”). *See also, Chutter, Inc. v. Great Mgt. Gp., LLC*, 2021 USPQ2d 1001, at \*37-8 (TTAB 2021) (“Slight differences in marks do not normally distinguish them.”).

Applicant’s mark (RISK & REWARD) contains the second term in the singular form, whereas the cited registered mark (RIZKY REWARDZ) contains the second

term in the plural form. We find the second terms in the two marks are essentially identical in sound and appearance, rendering these second terms similar for likelihood of confusion purposes. *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ [both marks for candy] and they will therefore be regarded here as the same mark.”) *Swiss Grill Ltd., v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (holding “it is obvious that the virtually identical marks [the singular SWISS GRILL and the plural SWISS GRILLS, both for barbeque grills] are confusingly similar”); *Weider Publ’ns, LLC v. D & D Beauty Care Co., LLC*, 109 USPQ2d 1347, 1355 (TTAB 2014) (finding the singular and plural forms of SHAPE to be essentially the same mark).

The RISK & REWARD and RISK.REWARD marks share the identical first and second literal terms. As we stated above, the similarity or dissimilarity of the marks is determined based on the marks in their entireties, not upon dissecting the marks into their various components. *In re Nat’l Data*, 224 USPQ at 751; *Franklin Mint*, 212 USPQ at 234. There is nothing improper however, in stating that more or less weight is given to particular feature of the marks, so long as our conclusion rests on a consideration of the marks in their entireties, *Stone Lion*, 110 USPQ2d at 1161, which we have done.

The inclusion of the “&” symbol (ampersand) in Applicant’s RISK & REWARD mark does not meaningfully distinguish it, visually or aurally, from the RIZKY REWARDZ or RISK.REWARD marks. *See Henry I. Siegel Co. v. A & F Originals*,

*Inc.*, 225 USPQ 626, 628 (TTAB 1985) (“Applicant’s mark has three parts, including ... the ampersand. ... Th[is] additional component[] do[es] not visually or aurally distinguish applicant’s mark.”).

Conversely, the inclusion of the “.” (dot or period) in Registrant’s RISK.REWARD mark, as with other marks containing minor punctuation, does not visually or aurally distinguish it from Applicant’s RISK & REWARD mark. *See, e.g., B.V.D. Licensing v. Body Action Design*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (B.A.D. will be viewed as the word “bad”); and *Henry I. Siegel Co., Inc. v. Highlander, Ltd.*, 183 USPQ 496, 499 (TTAB 1974) (H.I.S. will be viewed as “his”); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (hyphen did not distinguish MAGNUM from MAG-NUM); *Winn’s Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979) (“[L]ittle if any trademark significance can be attributed to apostrophe and letter ‘s’ in opposer’s mark” WINN’S when compared with applicant’s mark WIN-WAY.); *Conwood Corp. v. S.A. Bongrain-Gerard (Les Maitres Fromagers)*, 190 USPQ 155, 158 (TTAB 1976) (Purchasers are “not apt to place too much significance or reliance” on accent mark appearing above letter in trademark.).

**Meaning and Commercial Impression:** We consider the commercial impressions of the marks as instructed by the U.S. Court of Appeals for the Federal Circuit. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

As noted above, Applicant contends that: 1) RISK & REWARD connotes a specific set of benefits associated with taking a risk, while RISKY REWARDZ connotes that

any reward associated with that mark is dangerous; 2) the presence of the letter “Z” in RIZKY REWARDZ has an urban connotation, considered in an ultra-positive manner in urban cultures, distinct from RISK & REWARD; and 3) the “.” (dot or period) in RISK.REWARD is commonly associated with an Internet address. Applicant did not make proofs of record to support any of these assertions. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). We find that the respective marks equally call to mind the common notion of a risk-to-reward ratio, and are therefore conceptually the same.

Moreover, Applicant has brought to the fore semantical distinctions as to the meanings and commercial impressions of the respective marks that we find irrelevant, as they are unlikely to be made or remembered by average consumers of clothing items. *Hancock v. Am. Steel & Wire Co. of N.J.*, 203 F.2d 737, 97 U.S.P.Q. 330, 333 (C.C.P.A. 1953) (“Our holding in this case that confusion is likely is based on our belief that the **popular or ordinary** meanings of... [the marks] are identical, although there are certain technical distinctions between the two terms.” (emphasis original)); *Mohawk Rubber Co. v. Mobiliner Tire Co., Inc.*, 217 USPQ 929, 932 (TTAB 1981) (“To average members of the purchasing public, ... [t]he fine distinctions [in meaning] between the ... [respective marks] have little significance.”); *Cf. In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (“Finding that the misspelling of the descriptive word HOUSING as HOUZING did not change the meaning or commercial impression of the mark for descriptiveness purposes: “[A]pplicant’s ...

mark, URBANHOUSING ..., will be immediately and directly perceived by consumers as the equivalent of the admittedly descriptive term URBAN HOUSING.”).

When viewed in their entirety by the elements of appearance, sound, meaning and commercial impression, we find that Applicant’s mark RISK & REWARD is more similar to than it is different from each of the registered marks RIZKY REWARDZ and RISK.REWARD. The first *DuPont* factor, similarity of the marks, also supports a finding that confusion is likely. This is particularly so because where, as here, the respective goods are in-part identical the degree of similarity necessary to support a conclusion of likely confusion declines. *In re Dixie Rests.*, 41 USPQ2d at 1534.

### **C. The Presence or Absence of Actual Confusion**

The seventh *DuPont* factor is the “nature and extent of any actual confusion, while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Applicant argues: 1) there is no evidence of any actual confusion between the registered marks cited by the Examining Attorney and/or other third-party registered marks that Applicant made of record, despite their similarities; 2) there is no evidence of any actual confusion between the registered marks cited by the Examining Attorney despite their concurrent use for over a year; 3) there has been no litigation made of record concerning, for example, the RISK.REWARD mark contesting the later registered mark RIZKY REWARDZ; and 4) Applicant’s RISK & REWARD mark is at least as distinguishable from the registered marks cited by the

Examining Attorney as the mark RIZKY REWARDZ is from the previously registered mark RISK.REWARD.<sup>9</sup>

Applicant's arguments are entirely misplaced. The inquiry as to the presence or absence of actual confusion is not as between or among the registered marks cited by the Examining Attorney, or as between or among the cited marks and the third-party registered marks made of record by Applicant. Rather, whether actual confusion exists, or is absent, examines the whether there has been an opportunity for such confusion to occur due to the concurrent use of Applicant's mark and any of the cited marks in the marketplace. *See, e.g., G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635, 1638 (Fed. Cir. 1990) (“[W]e note that despite over a decade of the marketing by ... [applicant] of Red Stripe beer in certain of these United States, ... [opposer] was unable to offer any evidence of actual confusion.”); *In re Guild Mortgage Co.*, 2020 USPQ2d 10279, at \*7 (TTAB 2020) (“While both Applicant and Registrant apparently conduct business in various states, the evidence does not indicate any specific geographical areas of overlap between the consumer markets for the business conducted by Applicant and the business conducted by Registrant.”).

As stated above in footnote 1, Applicant filed its RISK & REWARD Application based upon its allegation of a bona fide intention to use the mark in commerce. Applicant did not make of record any evidence demonstrating it has used the mark anywhere within the United States since the filing of its Application. We thus have

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<sup>9</sup> Applicant's Brief, 7 TTABVUE 18-19.

no evidence concerning the extent and circumstances of Applicant's and Registrants' concurrent uses of the respective marks was such as to give rise to meaningful opportunities for actual confusion to occur. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026–27 (TTAB 1984). In any event, “a showing of actual confusion is not necessary to establish a likelihood of confusion.” *Herbko*, 64 USPQ2d at 1380 (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983)).

We therefore find the presence or absence of actual confusion, the seventh and eighth *DuPont* factors, to be neutral in our analysis.

#### **D. Other Considerations**

The thirteenth *DuPont* factor considers “[a]ny other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Applicant argues that “[t]he concurrent **use** of each of th[e] [registered] marks [cited by the Examining Attorney, RIZKY REWARDZ, RIZKY REWARDZ and Design, and RISK.REWARD] without any apparent opposition or confusion evidences that consumers buying clothing are very discerning as to relatively small differences between marks and, consequently, favors registration of Applicant's mark [RISK & REWARD].” (Emphasis added).<sup>10</sup> Once again, as it did in relying upon the third-party registered marks it made of record, Applicant conflates its argument concerning concurrent use of its mark and the cited marks (for which there is no supporting evidence) with that of the concurrent registration of the cited marks.

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<sup>10</sup> Applicant's Brief, 7 TTABVUE 15.

In any event, the co-existence of the cited registrations has limited probative value in our decision and cannot justify the registration of another confusingly similar mark, as we do not have sufficient information to determine the facts surrounding the decisions to register the cited marks. While the USPTO strives for consistency, each case must be decided on its own facts and record. *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (quoting *In re Boulevard Entm't*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)). Moreover, prior decisions and actions of other Examining Attorneys have little evidentiary value and are not binding upon the USPTO or the Board. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Each case is decided on its own facts, and each mark stands on its own merits. *In re USA Warriors*, 122 USPQ2d at 1793 n.10 (quoting *In re Boulevard Entm't*, 67 USPQ2d at 1480).

We find the co-existence of the registrations cited by the Examining Attorney, which we have considered under the thirteenth *DuPont* factor, to be a neutral factor in our analysis.

#### **IV. Likelihood of Confusion - Conclusion**

Applicant's mark, RISK & REWARD, is similar in appearance, sound, meaning and overall commercial impression to each of the cited marks, RIZKY REWARDZ and RISK.REWARD, when compared in their entirety. Because the respective goods are identical-in-part, we presume they would be marketed in overlapping trade channels to members of the general public seeking to purchase clothing. The Internet third-party website evidence made of record supports the overlap of trade channels and target customers. We further find the absence of actual confusion and the co-existence

of the registered marks cited by the Examining Attorney to be neutral factors in our analysis. Balancing these factors for which there has been evidence and argument, we find that confusion is likely between Applicant's RISK & REWARD mark and each of Registrants' RIZKY REWARDZ and RISK.REWARD marks in connection with the identified clothing items.

**Decision:**

The refusal to register Applicant's RISK & REWARD mark is affirmed under Trademark Act Section 2(d), on the ground of likelihood of confusion.